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that when these goods were delivered to the vessel, they became the property of the consignors named in the invoices;

(3) That the British company got the legal title to the goods and the right of possession only if such were the intention of the parties, and that that intention was open to explanation, although the persons holding the papers might have innocently paid value for them;

(4) That in prize courts it is necessary for the claimants to show the absence of anything to impeach the transaction, and at least to disclose fully all the surrounding circumstances, and that the claimants had failed to do so;

(5) That the right of capture acts on the proprietary interest of the thing captured at the time of the capture, and is not affected by the secret liens or private engagements of the parties;

(6) That in this case the belligerent right overrides the neutral claim, which must be regarded merely as a debt and the assignment as a cover to an enemy interest.

The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo, where the vessel took on a cargo consisting of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken *in preparatorio*. Kleinwort Sons and Company of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. In this it was alleged that

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Kleinwort Sons and Company were merchants in London; that the members of the firm were subjects of the United Kingdom of Great Britain and Ireland; that in February and March, 1898, the bark, being then in Montevideo, bound on a voyage to Havana, took on board a cargo of jerked beef and strings of garlic shipped by Pla Gibernau and Company, merchants of Montevideo, to be transported to the port of Havana, and there to be delivered to the order of the shippers according to the condition of certain bills of lading issued therefor by the bark to Pla Gibernau and Company; that the members of the firm of Gibernau and Company were citizens of the Argentine Republic; that the bark left Montevideo on March 16, and proceeded on her voyage to Havana, until May 17, when, being at a point in the Bahama Channel off Martinique, she was captured by the United States cruiser New York, without resistance on her part, and sent into Key West as prize of war. That after the shipment of the cargo in Montevideo claimants made advances to the shippers and owners of the cargo in the sum of £6297, British sterling, to wit, £2714 item thereof, upon the security of said lot of 110,956 kilos of jerked beef and 19,980 strings of garlic, and £3583 item thereof, upon the security of said lot of 165,384 kilos of jerked beef; that at the time of making said advances and in consideration thereof, bills of lading covering the shipments were delivered to claimants duly indorsed in blank with the intent and purpose that they should thereby take title to said bills of lading, and to said shipments of jerked beef and garlic, and should, on the arrival of the vessel at her destination, take delivery of the shipments and hold the same as security for their said advances until paid, and with the right to dispose of said shipments and to apply the proceeds to the payment of their said advances; and accordingly the said Kleinwort Sons and Company did become and ever since have been and still are as aforesaid the true and lawful owners of the said bills of lading and of the shipments of jerked beef and garlic therein referred to. The affidavits further stated that the advances were equivalent in money of the United States to about $30,644.35, and that no part of the same had been paid, or otherwise secured to be paid.

THE CARLOS F. ROSES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 243. Argued January 12, 1900. — Decided May 14, 1900.

The Carlos F. Roses, a Spanish vessel, owned at Barcelona, Spain, sailed from that port for Montevideo, Uraguay, with a cargo which was discharged there and a cargo of jerked beef and garlic taken on board for Havana, for which she sailed March 16, 1898. On May 17, while proceeding to Havana, she was captured by a vessel of the United States and sent to Key West, where she was libelled. A British company doing business in London, laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Montevideo, and had received bills of lading covering the shipments. The vessel was condemned as enemy's property, but the proceeds of the cargo, which had been ordered to be sold as perishable property, was ordered to be paid to the claimants. *Held*,

(1) That as the vessel was an enemy vessel, the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary;

(2) That on the face of the papers given in evidence, it must be presumed

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The cause was heard on the libel and claims of the master of the bark and Kleinwort and Company, and the evidence taken *in preparatorio*. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership;" and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three *ex parte* affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. From these affidavits and papers it appeared that the voyage of the Carlos F. Roses was a joint venture entered into by Pedro Pagés of Havana, a Spanish subject; the Spanish owners of the vessel, and Gibernau and Company. The whole cargo was made up of two shipments, one of jerked beef and one of garlic, which had been purchased by Gibernau and Company on commission, and by them delivered to the Carlos F. Roses "consigned to order for account and risk and by order of the parties noted" in the invoices. The shipment of jerked beef containing 275,640 kilos in bulk was divided thus: 60 %, 165,384 kilos, "to the expedition or voyage of the Carlos F. Roses;" 40 %, 110,256 kilos, "to Mr. Pedro Pagés of Havana." The shipment of garlic was divided thus: 9990 strings, "account of Mr. Pedro Pagés," and 9990 strings for "account of" Gibernau and Company. Both invoices were signed by Gibernau and Company, and bore date March 11 and 12, 1898.

Harcke stated in one of his affidavits that: "The said cargo was ultimately destined for Don Pedro Pagés, of Havana, who in the ordinary course of business would by payment to or in-

demnification of Kleinwort Sons & Co. or their agents in that behalf take up the said bills of lading and thus be enabled thereon to take the goods. No payment whatever has been made to Messieurs Kleinwort Sons & Co., or their agents, on account of the payments made by them through the said advances by said Don Pedro Pagés, or by any person on his behalf, or otherwise, and the said Kleinwort Sons & Co. have been and are wholly unindemnified in respect of their said payments except so far as the proceeds of the said cargo and the insurance thereon which as the owners of the said goods they have become entitled to collect, thereby subrogating to their own right to the extent of such payments the insurers of the said goods."

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was *viséd* by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau and Company, "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau and Company for transportation to Havana "for account and at the risk of whom it may concern;" one of the bills covering a shipment of 165,384 kilos of jerked beef; another of 110,256 kilos of jerked beef; and the third of 19,980 bunches of garlic.

March 15, Gibernau and Company drew this bill of exchange:

"No. 128. Montevideo, March 15, 1898. For £2714 13 8. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714 13 8, value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

"Pla Gibernau & Co.

"To Messrs. Kleinwort Sons & Co., London."

On the same day Maristany drew this bill of exchange:

"No. 129. Montevideo, March 15, 1898. For £3583 11 6.

Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583 11 6, invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

"YSIDRO BERTRAN MARISTANY.

"To Messrs. Kleinwort Sons & Co., London."

This was indorsed by Gibernau and Company.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L't'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons and Company, and on May 9 were paid under discount by that firm. Harcke alleged that at the time of the acceptance of these bills of exchange, bills of lading covering the shipments of the garlic, and the jerked beef shipped for account and by order of Pagés, indorsed in blank by Gibernau and Company, were delivered to claimants, as security for the payment of the bills of exchange; and that thereafter the bill of lading covering the shipment of jerked beef made for the account and by the order of the Carlos F. Roses was delivered in like manner, but affiant did not state when. It was also alleged that on April 9 the bills of lading and invoices, covering the shipment of garlic and Pagés's share of the jerked beef were mailed by Kleinwort Sons and Company to Gelak and Company, bankers of Havana, to be held until the bills of exchange charged to the account of Pagés should be paid. Neither the instructions sent to Gelak and Company, nor a copy of them, were produced. Harcke further alleged that the bills of lading and the invoices covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons and Company "pending the disposal of the said cargo." On May 17, the day of the capture, Kleinwort Sons and Company cabled Gelak and Company requesting them to return the bills of lading and invoices, which had been forwarded on April 9. June 9, Gelak and Company replied that the bills and invoices had not been received. On October 21 claimants produced these bills of lading, alleging that they had been received from Gelak and

Company on October 18, and that neither Pagés, Gibernau and Company, nor the owners of the Carlos F. Roses had paid claimants anything for or on account of their acceptance and payment of the bills of exchange. The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal.

Mr. James H. Hayden and *Mr. Assistant Attorney General Hoyt* for the United States. *Mr. Joseph K. McCammon* was on their brief.

Mr. Wilhelmus Mynderse for the claimants.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. *The London Packet*, 5 Wheat. 132; *The Sally Magee*, 3 Wall. 451; *The Benito Estenger*, 176 U. S. 568.

Further proofs on claimant's behalf were ordered to be furnished within sixty days from June 2; and the time was enlarged to August 31; and again to October 15. The proofs

tendered were three affidavits of claimants' manager sworn to September 27, October 12 and October 21, 1898, respectively, with accompanying papers. Such *ex parte* statements, where further proofs have been ordered, though admitted without objection, are obviously open to criticism, but without pausing to comment on these in that aspect, we inquire whether they satisfy the requirements of the law of prize in respect of the establishment of the neutral character of this cargo under the circumstances.

Gibernau and Company were citizens of a neutral state; they were evidently commission merchants, and in each invoice a charge for their commission on the shipment appears. The invoices expressly provided that the goods were shipped "to order for account and risk and by order of the parties noted below." The consignees noted below in the invoice of the jerked beef were the owners of the vessel, "the expedition or voyage of the 'Carlos F. Roses'" and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and "the undersigned;" that is, Gibernau and Company. There were three sets of bills of lading issued by the master to Gibernau and Company. One covered the portion of the shipment of jerked beef made for the account of the vessel; another, the portion of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau and Company. All the bills set forth that the goods were taken for the account and at the risk of whom it might concern. The ship's manifest was signed under date March 15, and the destination of the cargo was stated thus: "Shipped by Pla Gibernau Co. To order." The *visé* of the consul of Spain, dated the day before, was: "Good for Havana, with a cargo of jerked beef and garlic." As the vessel had a share in the shipment of the jerked beef, and the consignees were named in the invoices, which set forth that the shipments were made by their orders for their account and at their risk, it would appear that the manifest was erroneous, and this and the fact that the bills of lading stated that the goods were taken "for account of whom it may concern," should be especially noted, since the reasonable inference is

that the consignees must have been known to the master. And it also should be observed that there was no charter party, which would have necessarily revealed the engagements of the vessel, but which naturally would not be entered into if the commercial venture was that of her owner. The general rule is that a consignor on delivering goods ordered, to a master of a ship, delivers them to him as the agent of the consignee so that the property in them is vested in the latter from the moment of such delivery, though the rule may be departed from by agreement or by a particular trade custom, whereby the goods are shipped as belonging to the consignor and on his account and risk. We think that on the face of the papers it must be concluded that when these goods were delivered to the vessel they became the property of the consignees named in the invoices. Hence the shipments of jerked beef must be regarded as owned by Pagés, or by him and the owners of the Carlos F. Roses. One half of the garlic belonged to Pagés, the remaining half was consigned to Gibernau and Company, and they did not claim, and have not claimed it, nor was it asserted that Gibernau and Company retained the ownership of any part of the cargo after its delivery to the vessel. Property so long unclaimed may be treated as in any view good prize. *The Adeline*, 9 Cranch, 244; *The Harrison*, 1 Wheat. 298. In fact, claimants admit that the whole cargo "was ultimately destined for Don Pedro Pagés of Havana." The bill of exchange drawn by Gibernau and Company named Kleinwort Sons and Company as acceptors, and directed them to charge the amount to the account of "Pedro Pagés of Havana as per advice." The bill drawn by Maristany also named Kleinwort Sons and Company as drawees, and directed them to charge the amount "to P. Roses Valenti of Barcelona as per advice." In neither of them was there any reference to the cargo, and, so far as appeared, the amounts were at once charged up to the persons named.

Harcke said that when the bills of exchange were accepted by Kleinwort Sons and Company bills of lading covering the shipment of 110,256 kilos of jerked beef and of the garlic were delivered to them in consideration of the acceptance of the

draft for £2714 13 8, and that bills of lading for the 165,354 kilos of jerked beef were afterwards delivered in consideration of the acceptance of the draft for £3583 11 6. But the date of the latter delivery was not given, and it affirmatively appeared that whenever these bills of lading reached Kleinwort Sons and Company they were retained "pending the disposal of the cargo." Both drafts were accepted April 6, and the bills of lading for the 110,256 kilos of jerked beef and for the garlic were forwarded to Gelak and Company on April 9, but the bills for the 165,384 kilos of jerked beef, whenever received, never were. The instructions to Gelak and Company were not put in evidence, nor any of the correspondence with Valenti or Pagés. In June, Gelak and Company cabled that the bills sent to them had not been received; in September they turned up, but no information was afforded as to how they came into Gelak and Company's possession; and in October duplicates were also received by claimants from Gelak and Company, with, so far as disclosed, no accompanying explanation. And Harcke's affidavits failed to set forth the relations, transactions or correspondence existing and passing between claimants and the enemy owners of the cargo. This, although, as Sir William Scott said in *The Magnus*, 1 C. Rob. 31, "the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the court would have looked for satisfaction."

The affidavits alleged that claimants were wholly unindemnified except by the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their own rights, but did not state whether the insurance contemplated a war risk, or why the bills of lading for the larger portion of the beef were retained by claimants and not sent to their Havana agents, or whether they retained them upon instructions from the enemy owners; or whether they came to claimants from Spain; nor did anything appear in respect of the interest of Pagés as consignee for himself, or in a representative capacity; nor of Valenti, the owner of the enemy vessel, who resided at Barcelona. The evidence of enemy interest arising on the face of the documents called on the asserted neutral owners to prove

beyond question their right and title. And still for all that appears, the documents may have been sent merely to facilitate delivery to the agent of the enemy owners.

Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. *Pollard* v. *Vinton*, 105 U. S. 7; *Shaw* v. *Railroad Company*, 101 U. S. 557.

Generally speaking, in the purchase and shipment of goods on bills of lading attached to bills of exchange drawn against them, the bill of exchange is drawn on the consignee and purchaser, and sent forward for collection through the banker at the place of shipment, who advances on the draft, and thereafter realizes on it through his correspondents, or by sale as exchange; or the banker at some other point, or at the general exchange center, may be the drawee of the bill of exchange instead of the consignee or real owner, the banker standing in the place of the owner, in virtue of some arrangement with his customer, or on the faith of a running account, the pledge of other securities, or the customer's personal liability, so that the draft may be charged up at once, and, at all events, the control of the goods is not the sole reliance of the banker.

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of any-

thing to impeach the transaction, and at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion, — the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd., xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier, (Rawle's Revision,) 73; *The Young Mechanic*, 2 Curtis, 404.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . . But in cases of liens created by

the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . . The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the war of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them,

and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The *bona fides* of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overriden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was *in delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by *bona fide* mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his

hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade, would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498, the steamer Battle and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks Prize Cases, 26.

The Tobago was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . . But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in

a court of prize? . . . The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . . But it is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. . . . But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . . I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was

disallowed because the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien,